
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Improving Public Safety Communications in)	WT Docket No. 02-55
the 800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land)	
Transportation and Business Pool Channels)	

To: The Commission

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SUMMARY

Even as supplemented, the Nextel plan remains fundamentally flawed and unduly benefits the entity that is causing the vast majority of the interference to public safety – Nextel. The plan does not to eliminate interference to public safety due to its continuing focus on rebanding the 800 MHz band while failing to adequately address the impact that public safety equipment has on overload and intermodulation interference. Nextel’s contingent funding contemplates only 1% of the public safety receivers being replaced, leaving 99% of the public safety receivers still subject to interference.

The Supplemental Comments continue to assert that in return for spectrum Nextel would “surrender” under its plan, Nextel must “be made whole.” The comment record establishes the folly of this argument. Nextel is the predominant cause of interference to public safety due to engineering decisions it has made in the construction and design of its cellular-like network. Moreover, Nextel would actually improve the value of its spectrum holdings in the 800 MHz band through its acquisition of contiguous spectrum and the attendant improvement in the interference problem it is causing. The spectrum it proposes to contribute at 700 and 900 MHz has nothing to do with solving interference and everything to do with creating a pretext to justify its self-serving claim to 10 MHz of spectrum in the 1.9 GHz band. This spectrum grab by Nextel needs to be acknowledged for what it is.

The funding “solution” proposed by Nextel is untenable and misleading. Nextel’s proposed \$850 million funding proposal represents a cap, beyond which no reserve exists. Thus, if the money runs out for any reason, including the likely need to replace more than 1% of public safety receivers, public safety relocation will simply stop. Nextel’s contribution is also contingent upon adoption of the Nextel plan as a whole, which cannot occur for a variety of public interest, legal, technical and economic reasons. The plan’s proposal to create a new corporate entity or entities to secure Nextel’s financial commitment presents a number of additional flaws and unresolved questions, notably whether the FCC can compel enforcement of the proposed private funding mechanism.

Ultimately, the Nextel plan fails because it cannot eliminate interference despite the costly and disruptive realignment it contemplates. Acknowledging its ineffectiveness, the plan ironically proposes a new set of policies and procedures for “post-realignment interference mitigation,” which appears to displace the balanced cooperative approach set forth in the *Best Practices Guide*. Such a deviation is not only unnecessary, it is contrary to the approach previously taken by the Commission to resolve the types of interference at issue in this proceeding.

Rather than relying on a house of cards to solve the public safety interference problem, the Commission has a better long-term answer before it. The 700 MHz Solution will eliminate interference by relocating public safety to the 700 MHz band through the use of auction funds. As an immediate step, Commenters strongly support continued reliance upon the *Best Practices Guide* to resolve interference to public safety, and encourage the Commission to incorporate the obligations set forth therein into its rules. Consistent with the *Guide*, the Commission should also expressly approve the use of private market agreements by Nextel and others, such as case-by-case frequency swaps, conditioned on reducing interference to public safety.

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COMMENTS

ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Sprint Corporation, Southern LINC, and United States Cellular Corporation (collectively, “Commenters”) hereby comment on the supplement to the 800 MHz rebanding plan submitted by Nextel Communications, Inc. (“Nextel”) and others on December 24, 2002 (“Nextel plan”).¹ The Commission’s preeminent concern in this proceeding is to remedy interference; it is not to grant absolution to Nextel for the problems of its own making through the bequest of new contiguous spectrum. As discussed below, even as supplemented, the Nextel plan remains fundamentally flawed and unduly benefits the entity that is causing the vast majority of the interference to public safety – Nextel. By contrast, interim reliance on the *Best Practices Guide* and the ability to enter into private market agreements for spectrum swaps within the 800 MHz band, coupled with the long-term relocation of 800 MHz public safety licensees to the

¹ See *Public Notice*, “Wireless Telecommunications Bureau Seeks Comment on ‘Supplemental Comments of the Consensus Parties’ Filed in the 800 MHz Public Safety Interference Proceeding,” DA 03-19 (rel. Jan. 3, 2003); *Order Extending Time for Filing Comments*, DA 03-163 (rel. Jan. 16, 2003).

reallocated upper 700 MHz band (“700 MHz Solution”), remains the most efficient, effective and expeditious solution for solving public safety interference.

I. THE NEXTEL PLAN CONTINUES TO REST ON AN UNSTABLE FOUNDATION THAT UNDULY BENEFITS NEXTEL

In comments filed on September 23, 2002, certain of the Commenters addressed a revised version of the plan put forth by Nextel and others to address interference to 800 MHz public safety entities, which relies in principle part on rebanding the 800 MHz band.² The Commenters demonstrated that the Nextel plan: (i) does not eliminate interference; (ii) is unduly disruptive; (iii) provides public safety with a marginal increase in spectrum resources; (iv) lacks an adequate funding mechanism; (v) is not spectrum neutral; and (vi) contains significant contingencies that render its proposed implementation schedule overly lengthy and extremely uncertain.³ The latest iteration of the Nextel plan, submitted in the form of supplemental comments on December 24, 2002 (“Supplemental Comments”), merely continues many of these same infirmities.

A. The Nextel Plan Cannot Be Adopted “As a Whole,” and Therefore It Must Be Rejected

As a preliminary matter, the Supplemental Comments repeatedly emphasize that every provision within the Nextel plan is interrelated and complementary and, as such, “*must* be adopted as a whole.”⁴ The comments threaten that “*any* material modification . . . would

² See Further Comments of ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Coupe Communications, Inc., Nokia Inc., Southern LINC, and United States Cellular Corporation (Sept. 23, 2002) (“Further Comments”).

³ See *id.*

⁴ Supplemental Comments at iv-v (emphasis added); see, e.g., *id.* at 3-4.

eliminate the voluntary commitments of and cooperation among the affected licensees.”⁵

Notably, the cornerstone of Nextel’s supplemental proposal – to contribute “up to” a total of \$850 million toward the relocation of 800 MHz incumbents – is expressly contingent upon the receipt of 10 MHz of nationwide spectrum at 1.9 GHz.⁶ The Commission cannot adopt the Nextel plan “as a whole,” however, for a variety of public interest, legal, technical and economic reasons highlighted below. Therefore, the supplemented plan fails.

B. The Nextel Plan Does Not Eliminate Interference to Public Safety

Among other things, the *Notice* in this proceeding instructed commenters to address how their plan(s) would achieve “interference elimination.”⁷ Even as supplemented, however, the Nextel plan does not eliminate interference.⁸ This critical failure is due to the plan’s continued focus on rebanding the 800 MHz band while only marginally acknowledging the effect that public safety equipment has on overload and intermodulation interference, and thus not curing this underlying problem.⁹ As Commenters have previously demonstrated, without replacing all public safety receivers, no rebanding within 800 MHz will eliminate public safety interference.¹⁰ Although intermodulation will be slightly improved, and out-of-band emissions (“OOBE”) will

⁵ *Id.* at 4 (emphasis added); *see id.* at v.

⁶ *Id.* at 4 n.6 (“Nextel’s funding offer was and is expressly conditioned on the Commission adopting the comprehensive [Nextel plan] . . . including granting Nextel a replacement 10 MHz nationwide CMRS license . . .”); *see also id.* at ii, 6.

⁷ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 F.C.C.R. 4873, 4888 (2002) (“*Notice*”).

⁸ *See* Supplemental Comments at iii.

⁹ *See* Further Comments at 6 & n.15 (citing record evidence).

¹⁰ *See* Further Comments at 5-7 (citing record evidence).

be improved to the extent that public safety is no longer interleaved with low-site, low-power operations, receiver overload will not be improved at all.¹¹

Yet, despite clear record evidence demonstrating that upgrades to public safety receivers are a critical component to eliminating public safety interference, the Nextel plan and Nextel's contingent funding contemplate only 1% of the public safety receivers being replaced,¹² leaving 99% of the public safety receivers still subject to interference. Indeed, public safety organizations otherwise supporting the Nextel plan have expressed concern over the Nextel funding because "there continues to be uncertainty as to the number of radios that will need to be replaced as part of the plan, which could have a *significant impact* on the total costs."¹³ For this reason, commenters have previously described the Nextel plan as nothing more than a "quick fix" that comes at great expense and disruption without representing a true solution¹⁴ – a description that is particularly appropriate for a plan that admittedly resolves only 1% of the problem.

The Supplemental Comments acknowledge this shortcoming of the Nextel plan by proposing changes, set forth in Appendix F, to the FCC's rules that would establish specific interference protection thresholds for non-cellular licensees.¹⁵ These thresholds are deemed

¹¹ See *id.*; cf. Supplemental Comments, App. F at F-1 (claiming that the Nextel plan would "reduce the probability" of intermodulation interference and "virtually eliminate[]" OOBE not in the proposed 814-816/859-861 MHz guard band, without discussing the effects of rebanding on receiver overload).

¹² See Supplemental Comments, App. A at A-4.

¹³ Supplemental Comments at 6-7 (emphasis added).

¹⁴ See, e.g., Reply Comments of Boeing Company at 10 (Aug. 7, 2002).

¹⁵ See Supplemental Comments at 39 & App. F.

necessary even *after* the rebanding has occurred because the Nextel plan cannot “eliminate entirely all possibility of interference.”¹⁶ Appendix F is addressed below in Section I.E.

C. The Nextel Plan is an Unwarranted Spectrum Grab

The Supplemental Comments continue to assert that “in return for the 700 MHz, 800 MHz and 900 MHz spectrum Nextel would surrender” under its plan to address public safety interference, Nextel must “be made whole on a spectral basis by the Commission assigning Nextel, as part of a Report and Order in this proceeding, a nationwide license for 10 MHz of paired spectrum at 1910-1915/1990-1995 MHz.”¹⁷ Although the record on this point is well established, it bears repeating just what triggered the “need” to find a solution to public safety interference, what Nextel is “giving up,” and what Nextel gets in return, in order to understand the folly of Nextel’s argument. Simply put, Nextel is the primary causer of interference and yet is the same entity who would obtain an unwarranted spectrum grab under the plan.

1. Nextel Is the Predominant Causer of Interference to Public Safety Due to Decisions of Its Own Making

First, the record reflects virtual unanimity that Nextel is the predominant causer of interference to public safety, while instances of interference from cellular radiotelephone service and non-Nextel SMR providers have generally been limited and willingly resolved on a case-by-case basis.¹⁸ The primary reasons for the Nextel interference are due to engineering decisions it

¹⁶ See Supplemental Comments at 39.

¹⁷ Supplemental Comments at 4 n.6, 13. However, the core of the Nextel plan, rebanding within 800 MHz, could be accomplished without involving the 700 MHz, 900 MHz and 1.9 GHz bands while still resolving the same amount of interference.

¹⁸ See Reply Comments of ALLTEL Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Coupe Communications, Inc., First Cellular, Nokia Inc., Southern
(continued on next page)

has made in the construction and design of its cellularized network in portions of the 800 MHz band that were initially allocated and licensed for other purposes.¹⁹ As set forth in the *Notice*, frequencies in the 800 MHz band were originally allocated to establish two commercial cellular systems in the upper part of the band, with private and compatible single base station designed SMR dispatch-type operations in the lower part of the band.²⁰ Nextel's predecessor-in-interest, Fleet Call, Inc. ("Fleet"), through waiver relief and subsequent rulemaking action at its behest, obtained permission to operate what it has marketed as a third cellular system in a portion of the band not designed for such use.²¹ This use, however, was based upon representations that cellularizing the network would not cause interference to public safety.²² The fact that Nextel's network design is now causing interference is of its own making and is something it should be responsible for correcting²³ – not something to be rewarded.

LINC, and United States Cellular Corporation at 3-5 (Aug. 7, 2002) ("Joint Reply Comments") (summarizing record evidence).

¹⁹ *Id.* at 3-4.

²⁰ *See Notice*, 17 F.C.C.R. at 4876-79; *see also* Supplemental Comments at 40.

²¹ *See, e.g.,* Comments of Carolina Power and Light Company and TXU Business Services at 8-10 (May 6, 2002) ("Carolina Comments") (citing case law); *see also* Comments of Commercial Radio and Television, Inc. at 2 (May 6, 2002).

²² Fleet's waiver represented that its cellular-like system "can be implemented without interference" to existing stations at 851-869 MHz and that interference "will be limited to isolated cases" capable of resolution by alterations to Nextel's operating parameters. *See* Fleet Call, Inc., Request for Authority to Assign SMR Licenses and Waiver of Certain Private Radio Service Rules, App. A at A-13 (Apr. 5, 1990) (appended to Carolina Comments). It emphasized that "[p]ublic safety systems should be accorded full and continuing protection." *Id.* at 33-34.

²³ As the Supplemental Comments acknowledge, "the Commission has traditionally applied a policy of 'last-in fixes it' for individual cases of interference when both licensees are in compliance with the Commission's rules." Supplemental Comments at 40 n.73.

2. The Spectrum Nextel Would Be “Giving Up” Does Not Equate to 10 MHz of Contiguous Nationwide Spectrum

Second, the spectrum Nextel would be “giving up” at 700, 800 and 900 MHz in no way equates to obtaining 10 MHz of contiguous nationwide spectrum at 1.9 GHz in addition to the contiguous nationwide spectrum it would be getting at 800 MHz. At 800 MHz, Nextel claims that it will be giving up a “running average” of 2.5 MHz of spectrum.²⁴ While this number is closer in fact to 1.8 MHz (assuming *arguendo* the validity of its calculations),²⁵ this *de minimis* loss is more than offset by the fact that Nextel is trading non-contiguous, uneven spectrum holdings for more useful and efficient paired 8 MHz contiguous blocks of nationwide spectrum that will help to curtail the interference it is currently causing.²⁶ Thus, Nextel would actually be trading up to contiguous nationwide spectrum at 800 MHz, which Nextel and others have acknowledged is more valuable than its current interleaved holdings.²⁷

²⁴ See Supplemental Comments at 13.

²⁵ See Further Comments at 13.

²⁶ See *infra* note 36; see also Further Comments at 13-15.

²⁷ See Reply Comments of Nextel Communications, Inc. at 33 (Aug. 7, 2002) (“Nextel Reply Comments”) (noting the “long-term benefits of . . . access to additional, contiguous spectrum”); *Development of SMR Systems in the 800 MHz Band, Third Report and Order*, 9 F.C.C.R. 7988, 8046, ¶ 103 (1994) (“[A]ssigning contiguous spectrum, where feasible, is likely to enhance the competitive potential of wide-area SMR providers.”); *Development of SMR Systems in the 800 MHz Band, Further Notice of Proposed Rulemaking*, 10 F.C.C.R. 7970, 8009 (1994) (“[B]ecause of the non-contiguous nature of the channels, there does not appear to be a high degree of interdependency among them; and, the limited geographic scope of the licenses is likely to make them less valuable than the licenses for the MTA blocks.”); see also *Development of SMR Systems in the 800 MHz Band, Memorandum Opinion and Order on Reconsideration*, 14 F.C.C.R. 17556, 17564-65 (1999) (“[B]locks of contiguous spectrum allow for more flexibility in terms of technological applications and innovation. Single channel licensing would not foster the kind of technological advancements that would allow SMR licensees, which typically operate multichannel systems, to compete with other CMRS licensees.”) (footnote omitted); *id.* at 17565 n.32 (citing Nextel support for the licensing of contiguous spectrum).

Nor can the 4 MHz of guard band spectrum Nextel proposes to contribute at 700 MHz justify a 10 MHz nationwide giveaway elsewhere. As a preliminary matter, the inclusion of this spectrum in the plan is a red herring because the spectrum has nothing to do with resolution of interference to public safety. Moreover, the spectrum exists only in 40 markets and is thus not nationwide.²⁸ The utility of this spectrum is also limited by statute to commercial use²⁹ and by FCC regulatory restrictions,³⁰ *i.e.*, cellular architecture is not allowed in the 700 MHz guard bands and Nextel is required to lease 50% of its capacity. Thus, as Nextel and its supporters have acknowledged, making this spectrum available for future public safety use would require Congress to pass legislation to reallocate the spectrum to public safety.³¹ That legislation would have to be very specific to Nextel, as there are other licensees in the 700 MHz guard bands.³²

Nextel's proposal to give up a "running average" of 4 MHz spectrum in the 900 MHz band is also a red herring. Not only is the average spectrum closer to 3.6 MHz, the spectrum is not nationwide and is not contiguous.³³ Nextel claims to be contributing this spectrum for B/ILT

²⁸ See Reply Comments of Aeronautical Radio, Inc. *et al.* at 17 (Aug. 7, 2002) ("Nextel Group Reply Comments").

²⁹ See Further Comments at 20 (citing Nextel Group Reply Comments at 26).

³⁰ In addition there are substantial operating limits on the use of the band, including extremely tight out-of-band emission limits. See, *e.g.*, 47 C.F.R. §§ 27.2(b), 27.53(d), 27.603(c).

³¹ See Nextel Group Reply Comments at 26.

³² Although the 700 MHz Solution also requires legislation, it resolves interference to public safety – unlike the Nextel plan. See *infra* Section II.

³³ See Further Comments at 16 (citing Nextel Reply Comments, App. I at 7).

and SMR relocation, but such relocation is purely voluntary under its plan.³⁴ Moreover, because Nextel claims it will need to use the 900 MHz spectrum for dual band operations during the 800 MHz realignment process, its offer to give a 50 kHz 900 MHz channel for every 25 kHz 800 MHz channel vacated does not take effect until *after* all the relocations have taken place – a process Nextel estimates will take 42 months – unless such licensees are willing to forgo relocation compensation.³⁵ Thus, much like the 700 MHz “contribution,” the 900 MHz spectrum has no direct relevance to the Nextel plan and is not needed to resolve public safety interference in the 800 MHz band, and therefore neither it alone nor the combination of the 700 and 900 MHz “contributions” can be counted as part of Nextel’s effort to be made “whole.”

In sum, Nextel is already improving the value of its spectrum holdings in the 800 MHz band through its acquisition of contiguous spectrum and the attendant improvement in the interference problem it is causing.³⁶ Moreover, the spectrum it proposes to contribute at 700 and 900 MHz has nothing to do with solving interference and everything to do with creating a pretext

³⁴ See Supplemental Comments at 25. Indeed, it appears that most B/ILT and “high-site” SMR systems will remain in the 800 MHz band. See *id.* at 10.

³⁵ See *id.* at 25-26 & n.42, 33-34, App. D at D-2.

³⁶ A recent Legg Mason report suggests that simply as a result of the contiguous spectrum Nextel would obtain in the 800 MHz band under its rebanding proposal, the value of its 800 MHz spectrum could increase from \$3.6 billion to \$5.8 billion – for a projected net increase of \$1.3 billion after its proposed \$850 million contribution is deducted. See Legg Mason, Nextel Takes Another Step in Spectrum Swap Plan (Dec. 31, 2002) (“Legg Mason Nextel Report”). As NAM/MRFAC has explained, “Nextel today occupies spectrum which is generally non-contiguous. The 800 MHz Plan would give Nextel a bounty of unencumbered, contiguous spectrum. This, in and of itself, is a basis for concern as it indirectly rewards the party who is responsible for the interference. The Commission should not put itself in the position of seeming to improve the interfering party’s position.” See Reply Comments of the National Association of Manufacturers and MRFAC, Inc. (“NAM/MRFAC”) at 5 (Aug. 7, 2002).

to justify its self-serving claim to 10 MHz of spectrum in the 1.9 GHz band.³⁷ This spectrum grab by Nextel needs to be acknowledged for what it is – a disproportionate and unwarranted “exchange” that the record amply shows is contrary to Section 309(j) of the Communications Act, case law precedent, and the FCC’s policy of not favoring one competitor over others.³⁸ The fact that Nextel seeks access to this spectrum even before the relocations start,³⁹ irrespective of whether its proposed monetary contribution is sufficient, only further demonstrates the self-serving nature of the proposal.

D. Funding for the Nextel Plan Is Precarious

Under its supplemented plan, Nextel proposed to contribute a total of \$850 million (\$700 million for public safety and \$150 million for non-public safety) towards the relocation costs of 800 MHz incumbents.⁴⁰ This funding proposal is subject to a number of fatal flaws.

³⁷ As the City of Baltimore has stated, the extent of an interference problem in Baltimore “may have been overstated by commercial parties [*e.g.*, Nextel] who see an opportunity to gain valuable blocks of spectrum.” Comments of the City of Baltimore, Maryland at 6 (May 6, 2002).

³⁸ See Joint Reply Comments at 10-11 (citing precedent and comment record); *see also Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (finding that the Commission cannot subordinate the public interest to the interest of “equalizing competition among competitors”); *accord W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981). Recent data from Legg Mason suggests that while rebanding alone could increase the value of Nextel’s spectrum holdings from \$3.6 billion to 5.8 billion and offset its proposed \$850 million contribution, the inclusion of 10 MHz in the 1.9 GHz band could further increase this amount to \$9.4 billion. See Legg Mason Nextel Report, *supra* note 36. Thus, taking into account Nextel’s proposed \$850 million contribution, in Legg Mason’s view that contiguous spectrum in the 800 MHz band alone could be worth \$1.3 billion and the 1.9 GHz spectrum could be worth another \$3.6 billion, for an estimated net increase of \$4.9 billion under the Nextel plan. See *id.*

³⁹ See Supplemental Comments at 6, 13, 33 & n.53, 34.

⁴⁰ Left unclear is whether Nextel’s comments in this proceeding also represent the views and contributions of Nextel Partners, Inc. (“NPI”), an entity in which Nextel has only a 30 percent non-controlling interest. Assuming NPI is not contributing to the \$850 million relocation
(continued on next page)

1. The Proposed Contribution Represents a Cap, Beyond Which No Reserve Exists

First, the \$850 million represents a cap, beyond which no reserve exists. As noted above, Nextel's latest funding "commitment" accounts for the replacement of only 1% of public safety receivers, despite the acknowledgment that "uncertainty" remains as to the number of radios that will need to be replaced, which "could have a *significant* impact on total costs."⁴¹ Record evidence suggests that the cost to implement the Nextel plan could exceed a billion dollars or more.⁴² Yet, to the extent the amount pledged proves to be insufficient, the plan simply states that "no public safety incumbent will be required to relocate."⁴³ In other words, if the money runs out for any reason, including the likely need to replace more than 1% of public safety receivers,⁴⁴ relocation will simply stop. Such an unfinished relocation would wreck havoc on interoperability efforts and would negate the whole effort by not solving interference at all for those entities not relocated.⁴⁵ For Nextel's funding proposal to have any merit, its commitment to pay to resolve the interference it created cannot be capped.

effort, it would seem that Nextel would be able to use its \$850 million to help fund the relocation costs of an affiliate which is one of the causers of interference to public safety in the 800 MHz band, thereby diminishing Nextel's true net contribution. *See* Comments of Small Business in Telecommunications ("SBT") at 19 (Jan. 10, 2003) ("SBT Comments"). To date, Nextel has made only the vague statement that NPI stands ready to confirm "its commitment to the [Nextel plan]." *See* Nextel Reply Comments at 9-10 n.9.

⁴¹ Supplemental Comments at 6.

⁴² *See, e.g.*, Reply Comments of SBT at 49-50 (Aug. 1, 2002).

⁴³ Supplemental Comments at 7.

⁴⁴ *See supra* Section I.B.

⁴⁵ *See, e.g.*, SBT Comments at 21-22.

2. Due to Unacceptable Contingencies Which Cannot Be Met, the Funding Proposal Fails Under Its Own Terms

Nextel's contribution is expressly contingent upon adoption of the Nextel plan as a whole, particularly with respect to the 10 MHz of nationwide spectrum it seeks at 1.9 GHz.⁴⁶ As discussed herein and in the existing comment record, not only is such a give-away unjustified on the merits and otherwise contrary to law, the Nextel plan *en toto* fails to eliminate interference to public safety, funding for the plan is precarious, and its post-realignment interference mitigation policies are unbalanced and unnecessary under other more reasoned plans. As a result, the plan cannot be adopted as proposed, and therefore funding the proposal fails under its own terms.

3. The Mechanics of Securing the Financial Commitment Present Additional Flaws

The plan's proposal to create a new corporate entity or entities to secure Nextel's financial commitment presents a number of additional flaws and unresolved questions. Under this aspect of the plan, the relocation fund will be managed by an independent fund administrator, with the stock of the entity(ies) pledged to an escrow agent/trustee who can sell the assets and hold the cash proceeds. The asset to be held is the 1.9 GHz spectrum, the license(s) for which can be sold by the agent/trustee if Nextel fails to satisfy its commitments. Nextel states that its commitment to funding is "cemented by its additional, immediate contribution of its 700 MHz band licenses," which it claims are worth a minimum of \$354,711,000 based upon the amount Nextel paid at auction in September 2000 and February 2001.⁴⁷

⁴⁶ See Supplemental Comments at 5-6.

⁴⁷ See Supplemental Comments at 8 & n.10.

As an initial matter, the plan's reliance on an independent fund manager raises a legitimate question, as posed by SBT, as to whether the FCC can "order Nextel to pay \$850 million into a privately operated fund."⁴⁸ In the absence of such authority, the FCC's ability to compel enforcement of the funding mechanism is seriously called into question.⁴⁹ The significance of Nextel's contribution of its 700 MHz licenses as a means of "cementing" its funding is unclear, but this aspect of the funding proposal does not forward funding of the plan or demonstrate that the 700 MHz spectrum is worth the \$354 million that Nextel paid for it.⁵⁰ Also left unclear is whether Nextel could sell stock in the new corporate entity which holds the licenses to help pay for relocation efforts or to help Nextel buildout its requested 1.9 GHz license, truly cementing Nextel's windfall. Even if this is not the case, questions over who would control the 1.9 GHz license(s) remain, as the agent/trustee will hold the stock in the licensee, yet Nextel would be responsible for buildout efforts.⁵¹ Perhaps most importantly, the proposal appears designed not to protect the funds, but to create liability protection for Nextel for any violation of its pledge⁵² – if it fails to pay, the sole recourse is selling the 1.9 GHz license(s) Nextel seeks to acquire for free outside the Section 309(j) auction process.

⁴⁸ See SBT Comments at ii, 5-6.

⁴⁹ See *id.* at 5 ("Extralegal financing mechanisms, based on voluntary cooperation, among wholly private entities, not subject to agency oversight, and lacking any foundation under Title 47 for the purpose of establishment, much less official recognition, cannot serve as the basis for rule making.").

⁵⁰ See *id.* 8 & n.5. As the Commission is well aware, the wireless spectrum market has undergone a precipitous decline and spectrum values are worth substantially less than they were in 2000 and 2001.

⁵¹ See Supplemental Comments at 8 & n.9; SBT Comments at 9-10.

⁵² See SBT Comments at 9.

**E. The Need for Post-Realignment Interference Mitigation Measures
Highlights the Impropriety of the Nextel Plan**

The Nextel plan calls for continued use of the *Best Practices Guide* during the period until its proposed band realignment is complete, a process estimated by Nextel to take 42 months.⁵³ Because the Nextel plan admittedly will not eliminate interference to public safety,⁵⁴ however, it also proposes a new set of policies and procedures for “post-realignment interference mitigation,” appended as Appendix F to the Supplemental Comments. Nextel’s Appendix F appears to displace the balanced cooperative approach set forth in the *Best Practices Guide*. Such an approach is not only unnecessary, it is contrary to the approach previously taken by the Commission to resolve the types of interference at issue in this proceeding.

The fact that the Nextel plan requires continued use of interference mitigation techniques after the completion of its proposed multi-year realignment plan demonstrates why its plan is not the best solution. As an initial matter, Nextel’s proposals in Appendix F are unnecessary because most instances of CMRS/public safety harmful interference can be resolved by parties using the *Best Practices* case-by-case approach, as Nextel and at least one public safety licensee have recognized.⁵⁵ The plan requires the expenditure of hundreds of millions of dollars (the exact scope of which remains unknown) and will cause tremendous disruption affecting virtually all licensees in the 800 MHz band for years to come, yet it will still not eliminate interference to

⁵³ See Supplemental Comments, App. D at D-2, App. F at §§ 1.1, 2, 3.0.b.

⁵⁴ See *id.* at 39.

⁵⁵ See Nextel Reply Comments at 40 (“In the majority of cases, [public safety] interference can be mitigated through changes in the operations, equipment, or practices of the CMRS licensee, the public safety operator, or both.”); Reply Comments of the City of Portland, Oregon at 2 (Aug. 7, 2002) (demonstrating that “the parties involved can work cooperatively to resolve many of the interference problems in the short term”).

public safety. This begs the question as to whether Nextel's proposed \$850 million contribution would be better spent by simply undertaking remedial efforts to resolve the interference its own engineering decisions have caused. In addition, the plan confirms that grabbing additional spectrum is Nextel's real goal in this proceeding.

Putting aside the ill-conceived nature of a plan that fails to eliminate interference and still requires permanent mitigation techniques, the plan fails to justify moving away from the balanced cooperative approach set forth in the *Best Practices Guide*. Currently, the *Best Practices Guide* directs the parties to "cooperate to determine the most efficient allocation of costs and resources necessary for interference mitigation" taking into account "the factors involved in a particular situation."⁵⁶ This approach recognizes that, depending on the circumstances, mitigation may involve, *e.g.*, adjustments to CMRS operating parameters, improving public safety signal strength or upgrading public safety receivers, and/or replacing poorly operating or degraded equipment.⁵⁷ The *Guide* also encourages the use of individual frequency swaps when other mitigation techniques are ineffective or would adversely impair the operations of a particular licensee.⁵⁸

By contrast, Appendix F would require CMRS licensees to mitigate OOBE or intermodulation interference experienced by non-cellular licensees as long as the latter's signal strength is -98 dBm or better for existing systems, or -95 dBm or better for new or replacement

⁵⁶ *Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz – A Best Practices Guide*, § V.A, Dec. 2000 ("Best Practices Guide").

⁵⁷ *See id.* at § V.A.1.

⁵⁸ *Id.* at § V.A.3.

systems, regardless of individual circumstances.⁵⁹ Only minimal adjustments in these requirements appear to be contemplated for inadequate non-cellular receivers, although strengthened FCC regulation in this area is suggested.⁶⁰ Appendix F would also impose more stringent OOB limits for CMRS,⁶¹ and contains provisions for co-located sites that appear to require co-located operators to reduce power or make other adjustments equally rather than based on each carrier's actual contribution.⁶²

The problems with these blanket rules are several. First, they fail to take into account individual circumstances – the cornerstone of the *Best Practices* approach. For example, if complying with the Nextel mitigation requirements necessitates system changes that create “dead spots” in coverage areas, who will be legally responsible for a 911 call that cannot be completed? Second, there is no mention of reimbursement rights with respect to post-realignment equipment modifications that may be necessitated as part of the mitigation requirements. Certain other proposed requirements, such as the maintenance of dedicated interference mitigation staff or prior coordination of operating adjustments with competitors and public safety/B/ILT operators are simply unworkable.

The unbalanced approach set forth in Appendix F is also inconsistent with the Commission's prior resolution of the types of interference at issue here – OOB, intermodulation and receiver overload (desensitization) – in the case of TV broadcast

⁵⁹ See Supplemental Comments at 41-42.

⁶⁰ See *id.*, App. F at § 4.1.1.

⁶¹ *Id.* at 43.

⁶² See *id.* at 42 n.76.

interference into land mobile operations.⁶³ There, the FCC generally determined that the interfering party, *i.e.*, the party transmitting the signal that is interfering with the existing party's reception, is responsible for resolving interference, particularly when the interference is due to OOBE.⁶⁴ With regard to receiver overload, however, it found that the "transmitting" party was not necessarily responsible if the receiving equipment was sub-standard or the system was designed to provide poor coverage.⁶⁵ In the case of intermodulation, the Commission determined that the transmitting party was not responsible for fixing the problem if the source of the interference was beyond its control,⁶⁶ as is the case when intermodulation is produced by the components inside the receiver. The balancing of responsibilities in this case between correcting harmful transmissions and improving/replacing inadequate reception devices counsels strongly in favor of continued reliance on the *Best Practices Guide* and rejection of Appendix F of the Nextel plan.

⁶³ See *Resolution of Interference Between UHF Channels 14 and Adjacent-Channel Land Mobile Operations*, 6 F.C.C.R. 5148 (1991).

⁶⁴ See *id.* at 5153. Notably, Chairman Powell recently remarked that "interference is not solely 'caused' by transmitters Instead, interference is often more a product of receivers; that is receivers are too dumb or too sensitive or too cheap to filter out unwanted signals." See Remarks of Chairman Michael K. Powell at the Silicon Flatirons Telecommunications Program, University of Colorado at Boulder, "Broadband Migration III: New Directions in Wireless Policy, at 3 (Oct. 30, 2002).

⁶⁵ See *id.* at 5153-54.

⁶⁶ See *id.* at 5154. Even where intermodulation is beyond the control of the TV broadcaster, however, it was still directed to cooperate and provide technical assistance to the land mobile licensee to resolve the problem.

II. CONTINUED USE OF *BEST PRACTICES* AS PART OF THE 700 MHz SOLUTION WILL BEST ACHIEVE THE FCC'S GOALS

As discussed above and in the existing comment record, virtually all instances of CMRS/public safety harmful interference can be resolved by parties using the *Best Practices Guide* adopted by the public safety and wireless community. Accordingly, Commenters strongly support continued reliance upon the *Best Practices Guide* to resolve interference to public safety pending congressional enactment of the 700 MHz Solution, and encourage the Commission to incorporate the obligations set forth therein into its rules. Consistent with the *Guide*, the Commission should also expressly approve the use of private market agreements by Nextel and others, such as case-by-case frequency swaps when other mitigation techniques are ineffective or would degrade operations, conditioned on reducing interference to public safety.

Reliance on *Best Practices* works and is working, and indeed the Nextel plan proposes to rely upon the *Guide* during its multi-year realignment process and beyond. The Nextel plan, however, fails to ultimately eliminate interference despite the costly and disruptive realignment it proposes. The long-term answer, therefore, is the 700 MHz Solution, which will *eliminate* interference by relocating public safety to the 700 MHz band through the use of auction funds. The 700 MHz Solution will also provide public safety with substantially increased spectrum rights, and the auction funding mechanism can be used to upgrade public safety equipment – something the supplemented Nextel plan makes only minimal provision to address. Moreover, the solution provides benefits to all 800 MHz licensees, and calls for date-certain implementation.

The following benefits are unique to the 700 MHz Solution, as detailed in the existing comment record before the Commission:⁶⁷

- ***Interference elimination*** – the 700 MHz Solution will permanently resolve harmful interference to public safety, not just mitigate it.
- ***Minimize disruption*** – the 700 MHz Solution requires the movement of only public safety licensees, rather than nearly all 800 MHz licensees.
- ***Increased spectrum*** – the 700 MHz Solution offers more than 20 MHz of additional contiguous nationwide spectrum to public safety, as opposed to less than 8 MHz of non-contiguous, non-nationwide spectrum.
- ***Adequate funding*** – the 700 MHz Solution will fund public safety relocation *and* equipment upgrades through auction revenues, rather than a capped \$850 million contingent contribution which designates only minimal funds for upgrades.
- ***Spectrum neutrality*** – the 700 MHz Solution solves the interference problem in a spectrum-neutral manner, unlike the revised Nextel plan which rewards Nextel, the primary causer of interference to public safety, with dramatically enhanced spectrum rights.
- ***Timing*** – the 700 MHz Solution calls for a date-certain to implement the permanent aspects of its plan – 2007 or earlier – while the revised Nextel plan has a number of contingencies which make a firm date indiscernible.

In short, the 700 MHz Solution it is the only plan to comprehensively address all of the Commission's goals in this proceeding, and should therefore be adopted.

⁶⁷ See Further Comments at 22-23 (summarizing record).

CONCLUSION

For the foregoing reasons, the Commission should reject the Nextel plan. The Commission should immediately act to adopt an order (i) codifying the requirements set forth in the *Best Practices Guide* and (ii) expressly permitting the use of private market agreements conditioned on resolving interference to public safety. To eliminate interference to public safety in the long-term, the Commission should and adopt rules and policies implementing the 700 MHz Solution.

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